

ORIGINAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----- X

LOUIS A. TERMINELLO, et al.,

Plaintiffs,

- against -

THE VILLAGE OF PIERMONT, et al.,

Defendants.

08 Civ. 1056 (WCC)

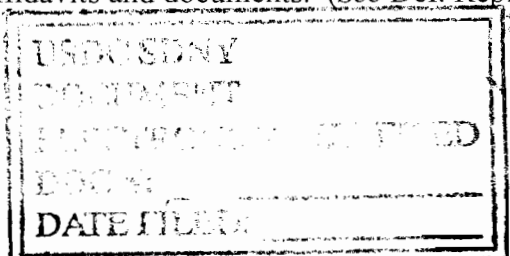
ECF CASE

ORDER

----- X
CONNER, Senior D.J.:

On March 13, 2008, defendants filed a Motion to Dismiss pursuant to FED. R. CIV. P. 12(b)(6). The Court has reviewed the papers submitted by plaintiffs and defendants. Both parties submitted affidavits and documents extrinsic to the Complaint.

As the parties are aware, in assessing the legal sufficiency of a claim, the Court may consider only the facts alleged in the complaint, and any document attached as an exhibit to the complaint or incorporated in it by reference. *See* FED. R. CIV. P. 10(c); *Dangler v. N.Y. City Off Track Betting Corp.*, 193 F.3d 130, 138 (2d Cir. 1999). However, the Court may base its decision on a document that is not properly incorporated by reference if the document is “integral” to the complaint and has been heavily relied on by the plaintiff in bringing suit. *See Holowecki v. Fed. Express Corp.*, 440 F.3d 558, 565-66 (2d Cir. 2006). The parties fail to explain, and this Court is unable to discern, how plaintiffs relied on the terms and effects of any of these documents or affidavits in bringing their claims. Defendants also object to this Court considering plaintiffs affidavits and documents. (*See* Def. Reply Mem. Supp. Mot. Dismiss at 1-2.)



E-
COPIES / MUST BE TO CHAIRMAN OF COURT

Rule 12(b) provides in relevant part: "If, on a motion asserting the defense numbered (6) to dismiss for a failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." *See Gurary v. Winehouse*, 190 F.3d 37, 43 (2d Cir. 1999).

It is therefore HEREBY ORDERED that the Motion shall be treated as a Motion for Summary Judgment under Rule 56. The parties shall submit to the Court any additional material they wish to be considered in determining such a motion by August 22, 2008.

SO ORDERED.

Dated: White Plains, New York
July 2, 2008


WILLIAM C. CONNER, Sr. U.S.D.J.